BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is not yet reported but will be found annexed to the transcript of record.

There was no opinion by the United States District Court for the Southern District of New York.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered May 6th, 1940.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended.

Statement of the Case and Specification of Errors.

The statement of the case and the specification of errors are contained in the petition.

ARGUMENT.

I.

Petitioner was entitled to the charge as requested, relating to the probative effect of evidence of good character.

By the main charge (R. 721), the jury was instructed as follows:

> "In this case we have had a number of so-called character witnesses who testified as to the reputation of the defendant for truth and veracity. Such evidence is not in and of itself sufficient to raise a rea-

> sonable doubt in your minds. It must be believed by you in order to raise a reasonable doubt. Testimony of good character may create a doubt against the positive evidence only when it is the judgment of the jury that the character is so good as to raise a doubt of the truth of the positive evidence. If you find such to be the case, then a reasonable doubt would exist in your minds and your verdict should be one of acquittal. THE FACT THAT A PERSON HAS BORNE A GOOD REPUTATION PRIOR TO THE TIME HE WAS ACCUSED OF A CRIME SHOULD NOT BE USED BY THE JURY AS A REASON FOR SHOWING LENIENCY TO ONE WHOSE GUILT HAS BEEN ESTABLISHED BY THE POSITIVE EVIDENCE BEYOND A REASONABLE DOUBT."

Petitioner excepted to the Court's refusal and failure to charge request No. 6 (R. 701) as follows:

> "6. Evidence of the defendant's good character may be considered by you with the other evidence in the case and may in connection therewith be sufficient to raise a reasonable doubt in your mind as to the guilt of the defendant.
>
> or
>
> That evidence of defendant's good character is in the same category as other factual evidence and must be considered by you in your deliberations. It may, of itself, if believed by you, create a reasonable doubt where otherwise no reasonable doubt would exist."

This was assigned as error (R. 978). The Court's charge was tantamount to an instruction to the jury that evidence of good character must outweigh the positive evidence in the case before petitioner would be entitled to the benefit of the probative effect of evidence of his good character.

We know of no case which has extended the rule to this extent. This very Court has declared:

> "Whatever may have been said in some of the earlier cases, to the effect that evidence of the good

> character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing." *Edgington* v. *U. S.*, 164 U. S. 361.

While the various Circuits are in direct conflict on this subject (see pp. 7-8, *ante*), there is no question but that the local (New York) applicable decisions support the petitioner's claim that the refusal to charge as requested, deprived him of a substantial right and a fair trial.

In *People* v. *Ulman*, 258 A. D. 262, 263, it was said:

> "Moreover, it is the law that evidence of good character may of itself create a reasonable doubt when without it none would exist. (*People* v. *Conrow*, 200 N. Y. 356; *People* v. *Bonier*, 179 id. 315, 321; *People* v. *Elliott*, 163 id. 11; *People v. Slaughter*, 253 App. Div. 802 (dissenting opinion by Martin, P. J.); revd., 278 N. Y. 479.)"

To the same effect, cases cited page 7, *ante*.

II.

Grievous and prejudicial error was committed by the Trial Court in its refusal to charge as requested by petitioner on the question of absence of willful intent and corrupt motive.

As already indicated, pages 4-5, *ante*, the petitioner urged as a defense that during the course of the Securities and Exchange Commission inquiry, an agreement was en-

tered into between his counsel and the Commission's Examiner by which the petitioner was to be accorded the right to examine the transcript of his testimony for the purposes of correcting errors, inaccuracies or omissions before he become bound thereby. The evidence as bearing upon the element of intent and offered by both sides was submitted to the jury.

In the main charge (R. 723) the jury was instructed:

> "One of the defenses urged here is that on the examination it was agreed by the examiner before any testimony was taken that the defendant was to have an opportunity to see a copy of his testimony so that he might check it for errors before he was bound by it. The witness Palmer testified to such an arrangement. The examiner denied any such arrangement. The examiner would have no authority to agree that the witness would not be bound by his testimony until he had an opportunity to examine the record • • • Whether there was such an agreement or whether there was not, the guilt of the defendant depends upon whether he gave false testimony wilfully in violation of his oath."

Upon this issue, petitioner excepted to the Court's refusal and failure to charge request No. 31 (R. 727) as follows:

> "31. That even if the jury finds that no agreement or stipulation was reached between Mr. Palmer and Mr. Murphy granting defendant the right to correct testimony before becoming bound thereby, they may nevertheless find that the defendant believed such right existed and if he gave his testimony in good faith in reliance thereon, they should take that in consideration in determining criminal intent and corrupt motive and in that event, the defendant should be acquitted."

This was assigned as error (R. 982). The irreparable damage and prejudice occasioned to petitioner lies in the fact that while the Court refused to charge as above, it did instruct the jury in accordance with request No. 32 (R. 728) in the following language:

> "If the jury finds that such an agreement was made between Mr. Murphy and Mr. Palmer and defendant gave testimony thereunder in good faith, you must acquit him."

Since criminal intent alone is the crux of the case, the combined effect of the charge and refusal to charge on that score as requested was tantamount to an instruction to the jury that before they could acquit the defendant, even if they found absence of corrupt motive and willful intent, they must first find as a fact that the agreement granting petitioner the right to correct his testimony was actually entered into. This, we submit, had the effect of either negating the Court's main charge respecting the question of criminal intent or served at least to confuse the jury on this all important question. Beyond this, the refusal to charge request No. 31 left the jury without instruction on an important element of the Government's case as well as the defense's contention. Manifestly, this was substantial error and highly prejudicial to the petitioner.

III.

The rejection of Defendant's Exhibit A for Identification deprived the defendant of the right to present to the jury competent and relevant evidence bearing upon his defense.

Defendant's Exhibit A for Identification (R. 927), never repudiated nor answered (R. 67 and 585), which

alluded to the making of the agreement referred to in the preceding point, was rejected by the Trial Court not as immaterial but rather as a self-serving declaration.

The witness Palmer gave direct positive evidence as to the making of that agreement (R. 549, 550). Among other things, the letter was offered as corroboration of such evidence. The Trial Court at the outset was inclined to receive it (R. 563, 564) and conceding the importance of the document, ordered an adjournment (R. 565) but on resumption of the trial, rejected it (R. 567).

The record discloses that the letter was offered not as proof of the statements therein contained but to establish (1) corroboration of the witness Palmer (see *People* v. *Epstein*, 245 N. Y. 234) and (2) an offer to correct petitioner's testimony as bearing on the question of intent. This Court, in *U. S.* v. *Norris*, 300 U. S. 564, 576, declared:

> "This is not to say that the correction of an innocent mistake, or the elaboration of an incomplete answer, may not demonstrate that there was no wilful intent to swear falsely."

This is a plain indication that an effort to correct a mistake or to elaborate an incomplete answer may suffice to demonstrate the absence of a wilful intent to swear falsely.

Bearing in mind that one of the assignments of perjury in the second count of the indictment specifically relates to the matter petitioner offered to correct by this document, the prejudicial character of the exclusion becomes manifest.

It might also be noted that the Government was given wide latitude respecting the introduction of evidence of defendant's acts and declarations after the date fixed in the indictment, as bearing on the question of intent (R. 223-226; 378; 439-453). Petitioner was entitled to at least the same latitude. In *Shreve* v. *U. S.*, 103 Fed. (2d) 796, 803, the Court said:

> "Intent is a state of mind difficult of precise proof and, therefore, evidence of other and surrounding circumstances may be received for the purpose of proving such intent. Acts done and declarations made after the act of which the defendant is accused are admissible as bearing on intent. Kulp v. United States, 3 Cir., 210 F. 249, 251. See also Samuels v. United States, 8 Cir., 232 F. 536, 541, 542, Ann. Cas. 1917 A. 711; Greenleaf on Evidence, 16th ed., vol. 3, Section 15, p. 21; Jones, Comm. on Evidence, 2d ed., vol. 2, Section 624, p. 1160, Section 632, p. 1175; Zoline's Fed. Crim. Law & Proc., vol. 1, Section 358, p. 297-298. Interesting academically are Wigmore, The Science of Judicial Proof, 3d ed., Section 119, p. 219, and Holmes, The Common Law, p. 53."

Another basis upon which the letter was admissible, is succinctly stated in 16 C. J. 571:

> "Evidence is sometimes admitted, or its admission is held not error, on the ground that similar evidence has been introduced, or proof of the same character has been made, by the adverse party. This is but common fairness."

It cannot be too strongly urged that depriving petitioner of the opportunity to present the letter to the jury for its consideration as corroboration of positive evidence and on the question of intent by the offer to correct, was highly prejudicial.

IV.

Petitioner was entitled to a mistrial as a result of the conduct of juror No. 4, which the Trial Court itself labelled "improper".

A reading of the Record (pp. 267-275) discloses that the conduct of juror No. 4 was improper. The Court had occasion to observe: "I do not approve of the conduct of

this juror * * *" (R. 270), and in the presence of the jury, added (R. 275):

> "Now, this has been an unfortunate incident in the course of this trial, and I have denied a motion for mistrial. Although I think the comment was improper and I am not condoning it, nevertheless, I do not think it goes to the extent of justifying a mistrial."

A reading of the colloquy between Court and counsel (R. 268-275) must lead to the irresistible conclusion that the usefulness of the juror complained of, was entirely impaired and that at his hands the defendant could not obtain his constitutional right to a trial by an impartial jury. The Record is indicative, likewise, of prejudgment or bias on the part of said juror. Since the incident occurred at the very outset of the trial, in the interests of justice, a mistrial should have been declared.

As was said in *Sunderland* v. *U. S.*, 19 Fed. (2d) 202, 212:

> "The least that can be said about this misconduct of one of the jurors is that it raises a grave doubt whether the constitutional right of plaintiffs in error to a trial by an impartial jury was not infringed."

V.

It was error for the Circuit Court below to refuse to treat the motions for dismissal and direction as motions for withdrawal, since upon this record the evidence was insufficient to support at least one assignment of perjury in each count of the indictment.

It is now well settled that where several assignments are submitted to a jury under one count of an indictment, and any one of those assignments is not supported by the evidence and should have been dismissed, a conviction on that count cannot stand.

People v. *Clarke*, 252 A. D. 122;
Wood v. *People*, 59 N. Y. 117;
People v. *Henry*, 196 A. D. 177;
People v. *Root*, 94 A. D. 84.

Mindful of the rule that "insufficient evidence is, in the eyes of the law, no evidence" (*Matter of Case*, 214 N. Y. 199, 203), an examination of the Record herein discloses that at least one assignment in each of the counts is not supported by the evidence, so that it cannot be determined upon which assignment in said counts the petitioner was found guilty.

In the interest of brevity, no attempt will be made to review each assignment of perjury in both counts although attention is respectfully directed to the motion to dismiss (R. 482-520) where each and every assignment was treated and discussed separately. Suffice it to say that Assignment A of Count 1 centers upon petitioner's ownership of stock. The Government's case hinges upon petitioner's alleged beneficial ownership of stock in the name of several friends and employees. The Record discloses that petitioner's

answers to the questions propounded in this connection were not only literally true, but from the context, the questioning, it appears, was directed to petitioner's record ownership as distinguished from alleged beneficial ownership (R. 749, 750). The charge was based upon petitioner's alleged false testimony that he owned "approximately" 90,000 shares of stock. It is conceded that this figure represents the extent of petitioner's legal and record ownership. The Government contended that petitioner had an equitable interest in approximately 20,000 additional shares owned by others and registered in those names. It appeared affirmatively upon the Government's case that out of such additional 20,000 shares, allegedly beneficially held, one-half or 10,000 thereof were treated, regarded and labelled as belonging to a person other than defendant (R. 229). In any event, it is patent that the examiner failed to inquire of petitioner whether he had a beneficial interest in that stock (fol. 2247, R. 749; fols. 2251-2, R. 751).

The attention of the witness not having been called to the precise fact concerning which the perjury is charged and the questions intended to elicit information having been inadequately framed, the testimony as charged in the indictment differs materially from the testimony given, which although literally true, is perhaps not frank. This is entirely insufficient to support a conviction for perjury.

U. S. v. *Slutzky*, 79 Fed. (2d) 504;
People v. *Criscuoli*, 164 A. D. 119;
People v. *Gillette*, 126 A. D. 665;
U. S. v. *Otto*, 54 Fed. (2d) 277.

Similarly, with respect to Assignment C of Count 2 of the indictment, there was no substantial evidence adduced in support thereof, by the Government. The Record (Government's Exhibit 2, R. 746) indicates that this matter re-

lates to petitioner's own opinion as to whether he violated Section 9(a)(2) of the Securities and Exchange Act of 1934 and was elicited by questions propounded by his own counsel at the close of the Commission's inquiry. The truth of his negative answer to the question thus propounded, was at no time disputed or put in issue by any evidence adduced by the Government. The Government contented itself with a mere showing that the petitioner had effected some transactions in the stock but there was nothing to establish by direct proof, inference or otherwise, that such transactions were fictitious, manipulative or in violation of the statute in question.

One's opinion as to whether he violated the law can neither be material to an investigation nor sustain a perjury conviction.

> *State* v. *Henderson*, 90 Ind. 406;
> *People* v. *Woolverton*, 8 Blackf. 452;
> *Rex* v. *Crespigny*, 1 Esp. 280;
> *Commonwealth* v. *Brady*, 5 Gray (Mass.) 78.

The Circuit Court below in holding that petitioner failed to ask the Trial Court to withdraw from the jury any specific assignment of perjury and thus making unavailable to him upon the appeal the contentions hereinabove urged, was error.

A reading of the motion for dismissal of the indictment and direction of the verdict (R. 483-520) in which each and every assignment of perjury in both counts was separately considered and argued, discloses that the motion was treated not only by counsel but by the Trial Court as one for the withdrawal from the jury's consideration of each and every specific assignment of perjury.

Upon a reading, the authorities, *U. S.* v. *Dilliard*, 101 Fed. (2d) 829, 833, and *Claassen* v. *U. S.*, 142 U. S. 140, 147,

cited and relied upon by the Circuit Court of Appeals, are found to be neither in point nor controlling here.

It is respectfully submitted that the Circuit Court of Appeals, in the interests of justice, should have exercised its discretion and treated the motion as one to withdraw. Its failure to do so constituted an abuse of discretion. *Crawford* v. *U. S.*, 212 U. S. 183.

VI.

The cumulative effect of the improper and prejudicial cross examination of character witnesses, cross examination of the witness Palmer and admission of circumstantial evidence and testimony by inference of petitioner's subsequent acts and declarations, imputing to petitioner the commission of other unrelated crimes, over objection and exception, was to deprive petitioner of his constitutional right to a fair trial.

No useful purpose will be served in reviewing the Record at length. Sufficient has heretofore been indicated (pp. 3, 9, *ante*) concerning the grossly improper and prejudicial cross examination of witnesses and character witnesses over petitioner's objection and exception.

The same may be said of the evidence of petitioner's conduct subsequent to the date of the alleged commission of the crime which likewise was highly prejudicial and tended to inflame the jury since it imputed to petitioner the commission of other crimes unconnected with the crime charged in the indictment.

Under the authorities cited, upon page 8, *ante*, it is respectfully submitted that petitioner did not obtain a fair trial and is thus entitled to a new trial.

Conclusion.

It is respectfully submitted that the petition should be granted as prayed for.

Dated: New York, May 27th, 1940.

Respectfully submitted,

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